

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GREG KIRKPATRICK, et al.,

Plaintiffs,

v.

IRONWOOD COMMUNICATIONS,
INC.,

Defendant.

CASE NO. C05-1428JLR

ORDER

I. INTRODUCTION

This matter comes before the court on Plaintiffs' motion to certify this case as a class action (Dkt. # 24) and Defendant's motion to deny class certification (Dkt. # 38). Defendant has also moved for summary judgment on one of Plaintiffs' claims (Dkt. # 21). The court has considered the parties' briefing and supporting evidence, and has heard from the parties at oral argument. For the reasons stated below, the court GRANTS Plaintiffs' motion in part, DENIES it in part, and DENIES Defendant's motions.

II. BACKGROUND

Plaintiffs (and putative class representatives) Greg Kirkpatrick, Robert Miller, and Elijah Clark were once field technicians ("FTs") who worked for Defendant Ironwood Communications, Inc. ("Ironwood"). Ironwood's business is the installation of cable and

1 satellite television equipment in homes across the nation. Ironwood's Washington FTs
2 primarily install home satellite equipment for DIRECTV, Inc. Although they perform the
3 bulk of their work in customers' homes, FTs receive their assignments and report their
4 work to one of four Washington offices. The offices, located in Vancouver, Tumwater
5 (formerly in Olympia), Lynnwood (formerly in Everett), and Spokane, serve defined
6 regions of the state. Ironwood designated one "area manager" with supervisory
7 responsibility over all Washington offices. At all relevant times, either Steve Hatter or
8 Gary Patapoff served as Ironwood's Washington area manager. Each Washington office
9 had a site director who reported to the Washington area manager. The site directors, in
10 turn, had primary responsibility for supervising Ironwood FTs.

12 Ironwood pays all of its FTs according to a piece rate or piecework system. Under
13 Ironwood's piecework system, FTs must record the piecework tasks that they perform
14 each day as well as the hours they work. Ironwood pays fixed piece rates for the various
15 piecework tasks. Each week, Ironwood calculates an FT's pay by first adding the amount
16 payable for the piecework the FT performed, then dividing this amount by the total
17 number of hours the FT worked. The resulting "hourly wage" is relevant in only two
18 circumstances: first, if the "hourly wage" is less than minimum wage, Ironwood
19 supplements the FT's total piecework pay to ensure that the FT makes at least minimum
20 wage; second, Ironwood pays 1.5 times the "hourly wage" for all hours that an FT works
21 in excess of 40. Thus, while FTs are not paid an hourly wage in the ordinary sense, the
22 number of hours they work is important in determining their compensation.

25 Disputes over Ironwood's policies for recording hours worked permeate this
26 lawsuit, and form the first of four categories of claims that the court will discuss
27 throughout this order. The named Plaintiffs in this action, in addition to at least a dozen
28 other former FTs, have submitted evidence that they often worked more than 40 hours in

1 a week. The evidence suggests that Ironwood often paid FTs properly under the piece
2 rate system described above. E.g., Ex. 22¹ (showing numerous time cards for Mr. Miller),
3 Ex. 56 (showing corresponding pay statements indicating that Mr. Miller was paid for all
4 time recorded). It also indicates, however, that Ironwood engaged in various practices to
5 prevent FTs from receiving pay for all hours that they worked. Some FTs allege that site
6 directors and other supervisors instructed them not to record all hours that they worked.
7 E.g., Barrio Decl., Bewick Decl., Emerson Decl., Hall Decl.² Others claim that site
8 directors and others instructed them not to record more than a fixed number of hours,
9 regardless of how many hours they worked. E.g., Miller Depo. at 36-38, 46, Clark Depo.
10 at 216, Hartz Decl., Imbler Decl., Lee Decl., McCarthy Decl., McCoy Decl., Walder
11 Decl. Some FTs claim that site directors threatened them with termination or other
12 sanctions if they recorded all of the hours they worked. E.g., Emerson Decl., Lee Decl.
13 Others claim that Ironwood altered time cards to reduce the number of hours that FTs
14 reported. E.g., Kirkpatrick Depo. at 106, 112-17, Clark Depo. at 200-202. Various FTs
15 claim that Ironwood refused to compensate them for all or part of the time they spent
16 driving to and from the homes where they performed their work. E.g., Hartz Decl., Lee
17 Decl., McCoy Decl., Holmes Decl. Some FTs who had supervisory responsibilities claim
18 that Ironwood refused to compensate them for hours they spent “on call” to assist other
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22 ¹All bare “Ex.” cites refer to exhibits to the declaration of Toby Marshall in support of
23 Plaintiffs’ motion for class certification.

24 ²Ironwood requests that the court strike many of the declarations from putative class
25 members because they allegedly violate various evidentiary rules. Rather than comply with this
26 court’s Local Rule regarding motions to strike, Ironwood filed a 23-page, single-spaced
27 declaration of counsel enumerating alleged deficiencies in the declarations. See Ghogomu Decl.;
28 see also Local Rules W.D. Wash. 7(g) (prohibiting litigants from bringing motions to strike that
are not contained within a responsive brief), 7(e) (limiting responsive class certification briefs to
24 pages). The court therefore declines to consider the declaration, and thus denies Ironwood’s
motion to strike.

1 FTs. E.g., Clark Depo. at 88, Kirkpatrick Depo. at 188, Hartz Decl., Lee Decl., Walder
2 Dec.. Similarly, some FTs state that once they finished their daily work, Ironwood
3 required them to assist other FTs who had not finished, and did not compensate them.
4 Clark Depo. at 87, Kirkpatrick Depo. at 189.

5 The second category encompasses claims regarding rest and meal breaks. Nearly
6 all Ironwood FTs who submitted evidence for Plaintiffs complain that Ironwood required
7 them to record a half-hour meal break whether they took a meal break or not. Most also
8 allege that Ironwood did not provide required rest breaks. These allegations support two
9 subcategories of unlawful conduct: that Ironwood deprived employees of pay by
10 requiring them to record work time as a meal break, and that Ironwood violated
11 Washington law by not providing required rest and meal breaks.

12 The third category concerns Ironwood's piece rate schedules. FTs allege that
13 Ironwood often changed piece rates without notice and failed to pay FTs under piece rates
14 in effect at the time they performed their work. E.g., Miller Depo. at 20, Clark Depo. at
15 42, Emerson Decl., Hall Decl., Lee Decl., McCarthy Decl., Holmes Decl., Walder Decl..

16 The fourth category of claims challenges Ironwood's practice of deducting money
17 for uniform cleaning and tool purchase from FTs' paychecks. E.g., Exs. 35-36, 41,
18 Emerson Decl., Hartz Decl., Imbler Decl., McCoy Decl., Holmes Decl..

19 Mr. Kirkpatrick, Mr. Miller, and Mr. Clark seek to serve as class representatives to
20 pursue these claims on behalf of themselves and all "hourly paid" Washington employees
21 of Ironwood since April 10, 2002. In addition, Plaintiffs propose to add Robert Bouchard
22 as a class representative. These individuals seek to represent not only Ironwood FTs who
23 worked under the piece rate system, but also Ironwood staff who worked inside
24 Ironwood's four Washington offices and were paid a traditional hourly wage. Plaintiffs
25 bring their claims solely under Washington law.

1 The court will first determine whether this action can proceed as a class action,
2 and will then turn to Ironwood's motion for summary judgment against Plaintiffs' claims
3 under the Washington Consumer Protection Act.

4 III. ANALYSIS

5 A. Class Certification

6 The court's decision to certify a class is discretionary. Local Joint Exec. Bd. of
7 Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1161 (9th Cir.
8 2001). In considering certification, the court must apply each of the applicable
9 requirements of Fed. R. Civ. P. 23. Id. (citing Clark v. Watchie, 513 F.2d 994, 1000 (9th
10 Cir. 1975)). The court must engage in a "rigorous analysis," but a "rigorous analysis does
11 not always result in a lengthy explanation or in-depth review of the record." Chamberlan
12 v. Ford Motor Co., 402 F.3d 952, 961 (9th Cir. 2005) (citing Gen. Tel. Co. of the S.W. v.
13 Falcon, 457 U.S. 147, 161 (1982)).

14 Plaintiffs bear the burden of demonstrating that the class they propose to represent
15 meets the Rule 23 requirements. Doninger v. Pac. N.W. Bell, Inc., 564 F.2d 1304, 1308
16 (9th Cir. 1977). Rule 23(a) requires Plaintiffs to demonstrate numerosity, commonality,
17 typicality, and adequacy of representation. Falcon, 457 U.S. at 161. If Plaintiffs satisfy
18 the Rule 23(a) requirements, they must show that the proposed class action meets one of
19 the three requirements of Rule 23(b). Zinser v. Accufix Research Inst., Inc., 253 F.3d
20 1180, 1186 (9th Cir. 2001). In this case, the parties concur that the only potentially
21 applicable requirement of Rule 23(b) is Rule 23(b)(3).

22 In determining whether the proposed class satisfies Rule 23, the court is neither
23 permitted nor required to conduct a "preliminary inquiry into the merits" of Plaintiffs'
24 claims. Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975) (citing Eisen v. Carlisle &
25 Jacquelin, 417 U.S. 156, 177 (1974)); see also Fed. R. Civ. P. 23 advisory committee's

1 note (2003) (“[A]n evaluation of the probable outcome on the merits is not properly part
2 of the certification decision”). As long as the court has “sufficient material before [it] to
3 determine the nature of the allegations, and rule on compliance with [the] requirements
4 [of Rule 23], and [it] bases [its] ruling on that material, [its] approach cannot be faulted
5 because plaintiffs’ proof may fail at trial.” Blackie, 524 F.2d at 901. The court may
6 assume the truth of Plaintiffs’ substantive allegations, id. at 901 n.17, but should consider
7 extrinsic evidence regarding whether the action is appropriate to treat as a class.
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9 With these guidelines in mind, the court turns to the Rule 23 requirements.

10 **1. The Proposed Class is Sufficiently Numerous.**

11 To satisfy the numerosity requirement of Rule 23(a)(1), Plaintiffs must show that
12 the proposed class “is so numerous that joinder of all members is impracticable.” Often,
13 the number of class members by itself is sufficient to establish the impracticability of
14 joining them as plaintiffs. Jordan v. County of Los Angeles, 669 F.2d 1311, 1319 (9th
15 Cir. 1982), vacated on other grounds by 459 U.S. 810 (1982). Where the sheer size of the
16 proposed class does not establish impracticality, the court should consider other factors,
17 including “the geographical diversity of class members, the ability of individual claimants
18 to institute separate suits, and whether injunctive or declaratory relief is sought.” Id.
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20 Here, Ironwood has provided data demonstrating that more than 600 employees
21 have worked at its Washington offices since April 2002. Ex. 55. As Plaintiffs admit, not
22 all of these employees are class members, because some worked in managerial capacities
23 and are not eligible for relief, and because others may not have worked at Ironwood long
24 enough to accrue claims in any of the four categories. Nonetheless, it is undisputed that
25 there are hundreds of employees in the proposed class, and it is undisputed that these
26 employees are dispersed across the state of Washington.
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1 The court finds that the proposed class is sufficiently numerous and widely
2 dispersed that joinder of all members would be impracticable.

3 **2. The Class Claims Present Common Questions of Fact and Law.**

4 Rule 23(a)(2) only requires Plaintiffs to show that “there are questions of law or
5 fact common to the class.” Although the Rule speaks of “questions” in the plural, courts
6 have held that a single common issue is sufficient to meet the commonality requirement.
7 E.g., Haley v. Medtronic, Inc., 169 F.R.D. 643, 648 (C.D. Cal. 1996). By contrast, Rule
8 23(b)(3) requires class plaintiffs to show that common questions predominate over
9 individualized questions. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir.
10 1998) (“The commonality preconditions of Rule 23(a)(2) are less rigorous than the
11 companion requirements of Rule 23(b)(3).”). The court reserves its discussion of the
12 predominance requirement, as well as a comparison of the common issues in this
13 litigation to those that require individualized treatment, for Section A.4, infra.

14 The court finds numerous common questions of law. The class claims require the
15 court to decide the presumably uncontroversial question of whether Ironwood was
16 required to pay its employees a premium wage for overtime hours. The court must also
17 decide the lawfulness of Ironwood’s admittedly statewide policy of taking payroll
18 deductions for uniform cleaning and tool purchase.³ Similarly, the court must inquire into
19 whether Ironwood’s mandatory meal break policy complied with Washington law, and
20 what legal restrictions govern its ability to modify piece rates it paid to FTs.
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26 ³Ironwood contends that, as the result of an investigation by the Washington Department
27 of Labor and Industries, it made lump sum payments to FTs to compensate for any impropriety
28 in its deductions for uniform cleaning and tool purchase. It also claims that the FTs’ acceptance
of those payments perfects its defense of accord and satisfaction. Rather than defeating
Plaintiffs’ commonality showing, these concerns merely highlight more common questions.

1 There are also common questions of fact. Rather than review all of them, the court
2 focuses on questions arising from a series of e-mail communications between Ironwood
3 management. In these communications, Ironwood's regional director of operations, Jim
4 Duran, and Ironwood's Washington area manager, Steve Hatter, instruct the site directors
5 at each of Ironwood's Washington offices to take action with respect to overtime hours.
6 In one string of e-mails, Mr. Hatter inquires of Mr. Duran: "No techs over 40 hours
7 then?" Ex. 18. Mr. Duran responds: "Whenever, and wherever possible." Id. Mr.
8 Hatter then forwards the exchange to three of the four Washington site directors, telling
9 them that "[w]ith our work load dropping off we need to be watching and cutting back
10 techs [sic] hours when ever [sic] possible." Id. In another e-mail, Mr. Hatter warns all of
11 the Washington site directors: "When I see techs in this file with 20 hours plus overtime
12 that is completely unacceptable." Ex. 26. In another e-mail, Mr. Hatter demands that site
13 directors explain the "insane hours" that some FTs had recorded. Ex. 32.

14 For purposes of class certification, the court construes these e-mails solely as
15 evidence that Ironwood's high-ranking officials were concerned about overtime work, and
16 communicated their concerns to its Washington offices in a hierarchical fashion.
17 Plaintiffs claim that these e-mails are evidence of a common scheme to reduce overtime
18 hours using unlawful methods. Ironwood claims that they show nothing more than
19 Ironwood's attempt to prevent workers from working excessive hours. The court cannot
20 resolve this dispute at this stage of the litigation. The mere existence of the dispute,
21 however, illustrates that there are common issues of fact regarding Ironwood's overtime
22 policy with respect to its Washington workers.

23 Each of Plaintiffs' remaining allegations raise common factual issues as well.
24 Their allegation that all Ironwood employees were instructed to record a thirty-minute
25 meal break is common to a large number of class members. Similarly, resolving the

1 allegations regarding Ironwood's systemic payroll deductions for uniform and tool
2 expenses will require the resolution of common questions regarding the policy. Finally,
3 any changes to Ironwood's piece rate schedules necessarily raise common factual
4 questions, as these schedules applied to all Ironwood FTs.

5 The court finds that the putative class members' claims present common issues of
6 fact and law, and that Plaintiffs therefore satisfy the commonality requirement of Rule
7 23(a)(2).
8

9 **3. The Class Representatives Satisfy the Typicality and Adequacy**
10 **Requirements of Rule 23(a)(3)-(4).**

11 Unlike the numerosity and commonality criteria, the criteria of adequacy of
12 representation and typicality focus on the class representatives. See Hassine v. Jeffes,
13 846 F.2d 169, 176 (3d Cir. 1988) (“‘[C]ommonality’ like ‘numerosity’ evaluates the
14 sufficiency of the class itself, and ‘typicality’ like ‘adequacy of representation’ evaluates
15 the sufficiency of the named plaintiff[s]”). Rule 23(a)(3) requires that the “claims or
16 defenses of the representative parties are typical of the claims or defenses of the
17 class” Rule 23(a)(4) requires Plaintiffs to show that “the representative parties will
18 fairly and adequately protect the interests of the class.” As several courts have noted,
19 considerations underlying the court's inquiry into adequacy and typicality often overlap.
20 E.g., In re MDC Holdings Sec. Litig., 754 F. Supp. 785, 801 (S.D. Cal. 1990) (“Even
21 though the typicality and adequacy of representation requirements are separate, the
22 concerns [they address] overlap a great deal.”).

23
24 **a. Adequacy**

25 Turning first to the adequacy of the proposed class representatives, the court must
26 consider whether they have “any conflicts of interest with other class members” and
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1 whether the class representatives will “prosecute the action vigorously on behalf of the
2 class.” Hanlon, 150 F.3d at 1020.⁴

3 The record establishes that each of the three proposed class representatives has
4 already participated vigorously in this litigation. Ironwood offers neither evidence nor
5 argument suggesting otherwise.

6 The parties agree that there is at least one conflict of interest between the proposed
7 class representatives and other class members. Because Mr. Miller, Mr. Kirkpatrick, and
8 Mr. Clark are all former employees of Ironwood, they have neither incentive nor standing
9 to pursue claims for injunctive and declaratory relief on behalf of current Ironwood
10 employees. Plaintiffs nonetheless seek such relief in their complaint. Plaintiffs concede
11 that this situation gives rise to a conflict of interest, but they propose to cure it by adding
12 a fourth class representative, Robert Bouchard. Mr. Bouchard currently works as an FT
13 in Ironwood’s Vancouver office. Ironwood appears to concede that adding Mr. Bouchard
14 as a class representative would provide representation for current employees. For
15 purposes of considering the class certification question, the court will treat Mr. Bouchard
16 as a class representative.

17 Ironwood argues that Mr. Bouchard highlights another inadequacy in the proposed
18 class representatives. Mr. Bouchard, like most (or perhaps all) FTs who work in
19 Ironwood’s Vancouver office, performs a portion of his work in Oregon. Under Bostain
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23 ⁴The parties often cite older cases which consider the adequacy of class counsel as part
24 of the Rule 23(a)(4) inquiry. In 2003, Congress added Rule 23(g) to define the court’s inquiry
25 into the adequacy of class counsel, thereby decoupling this inquiry from Rule 23(a)(4). See
26 Fed. R. Civ. P. 23(g) advisory committee’s note (2003) (“Rule 23(a)(4) will continue to call for
27 scrutiny of the proposed class representative, while [subdivision (g)] will guide the court in
28 assessing proposed class counsel as part of the certification decision.”). When asked at oral
argument, counsel for Ironwood raised no challenge to the adequacy of class counsel. The
court’s review of the declarations that Plaintiffs’ counsel submitted demonstrates that they
satisfy the requirements of Rule 23(g).

1 v. Food Express, Inc., employees cannot recover under Washington law for hours worked
2 in Oregon, even if they are paid as Washington employees. 111 P.3d 906, 910 (Wash. Ct.
3 App. 2005), review granted, 132 P.3d 145 (Wash. 2006). If Mr. Bouchard serves as a
4 class representative, employees who worked in Oregon will have someone to pursue their
5 interests. There is no indication on the record, however, that the claims that are currently
6 before the court adequately cover the interests of such employees. The pending claims
7 invoke only Washington law, and thus Vancouver employees have no redress for hours
8 worked in Oregon. Such employees might be better served by pursuing additional claims
9 under Oregon law, or by pursuing claims under federal wage and hour laws. The court
10 will require Plaintiffs to address these issues in future pleadings.

11
12 Putting aside the concerns over the interests of current employees and Vancouver
13 employees, the court finds no other conflicts of interest between the proposed class
14 representatives and other class members. Ironwood points out that since leaving
15 Ironwood, Mr. Miller has complained that an Ironwood FT damaged his television. In
16 addition, Mr. Kirkpatrick was apparently the target of a sexual harassment allegation from
17 an administrative employee at the Lynnwood office. While these are no doubt conflicts
18 between class members, they are not inimical to the class representatives' incentive to
19 pursue redress fairly on behalf of the class. Even were Mr. Miller or Mr. Kirkpatrick
20 inclined to represent the class in a manner detrimental to these two employees, it would
21 be impossible for them to do so while representing their own interests.

22
23 The most serious concern over the adequacy of the proposed class representatives
24 are the criminal records of Mr. Miller and Mr. Kirkpatrick. Such concerns are relevant to
25 the adequacy of a class representative. See Newberg on Class Actions, § 3.36 n.1-2 (4th
26 ed. 2002) (citing cases considering the adequacy of class representatives with criminal
27 histories). Mr. Kirkpatrick served three days in jail for a 1995 felony theft conviction.

1 Ex. 12, Kirkpatrick Depo. at 65-67. He apparently also has misdemeanor convictions.
2 Mr. Miller's criminal history is more extensive. He admits to seven felony convictions as
3 well as an assortment of misdemeanors. Miller Depo. at 71, 76. Although several of his
4 felony convictions occurred in the distant past, he admits to theft and fraud convictions
5 arising from a 2002 scheme in which he defrauded persons seeking work in the
6 construction industry. Id. at 73-75.

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8 The court finds that Mr. Miller's criminal history makes him an inadequate class
9 representative, but Mr. Kirkpatrick's criminal history does not. The court stresses that a
10 criminal record does not automatically disqualify a putative class representative. Indeed,
11 in Mr. Kirkpatrick's case, his criminal history is almost a decade behind him, and there is
12 no indication that his conviction will have a significant impact on his ability to represent
13 class members. Mr. Miller, on the other hand, has a criminal record that is likely to
14 seriously undermine his credibility. At least three of his felony convictions are recent,
15 and at least two arise from a crime involving dishonesty. Under Fed. R. Evid. 609, Mr.
16 Miller will likely be subject to multiple attacks on his credibility based on his past crimes.
17 These attacks will likely severely limit Mr. Miller's ability to vigorously pursue the
18 interests of absent class members. For these reasons, Mr. Miller is not an adequate class
19 representative.
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21 **b. Typicality**

22 Having discussed the adequacy of the proposed class representatives, the court
23 now turns to whether Mr. Kirkpatrick, Mr. Clark, and Mr. Bouchard present claims that
24 are "typical of the claims or defenses of the class" under Rule 23(a)(3). It is not
25 necessary that the class representatives' injuries be identical to all class members', "only
26 that the unnamed class members have injuries similar to those of the named plaintiffs and
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1 that the injuries result from the same, injurious course of conduct.” Armstrong v. Davis,
2 275 F.3d 849, 896 (9th Cir. 2001).

3 Here, no single class representative has claims that are typical of the entire class,
4 but the representatives collectively typify the class. All three representatives allege that
5 they were instructed to record meal breaks whether they took them or not. Ironwood
6 made deductions from all three representatives’ paychecks for uniform cleaning, and
7 made deductions from Mr. Clark and Mr. Kirkpatrick for tool purchase. All three
8 representatives worked under Ironwood’s piece rate schedules.

10 As to claims for uncompensated hours of work, the typicality inquiry is more
11 complicated, but the result is the same. Mr. Kirkpatrick alleges that Mike Lee, a site
12 director at Ironwood’s Lynnwood office, instructed him not to record more than 50 hours
13 per week. Mr. Kirkpatrick passed the same instructions to his team of FTs. He also
14 claims to have seen Mr. Lee and Mr. Hatter modifying employees’ time cards, although
15 he does not know which employees. He alleges that Ironwood did not pay him for some
16 of his drive time, that it did not pay him for time he spent on call for other FTs, and that it
17 did not pay him for assisting other FTs on jobs late in the day. Mr. Clark also claims to
18 have been instructed not to record more than 50 hours of work in a week, and claims to
19 have seen Mr. Hatter and Mr. Lee altering time cards. Like Mr. Kirkpatrick, he claims
20 that he spent time on call for which he was not paid. Other than improperly recorded
21 meal breaks, Mr. Bouchard does not allege that he worked hours for which he was not
22 compensated.

25 The court’s comparison of the declarations Ironwood submitted from potential
26 class members with the claims of the proposed class representative shows that no class
27 member has a claim for which he or she will lack a representative with substantially the
28 same claim. A few potential class members allege improper conduct that no class

1 representative experienced, including disputes over insurance benefits, “custom work,”
2 and per diem payments for travel. At oral argument, Plaintiffs’ counsel confirmed that
3 these claims are beyond the scope of this class.

4 Ironwood correctly notes that none of the proposed class representatives worked in
5 Ironwood’s offices in Olympia and Spokane.⁵ None of the class representatives purports
6 to have substantial knowledge regarding practices in these other offices. Moreover,
7 because each Washington office had a different site director communicating wage and
8 hour policies to its employees, and a series of different site directors served in each office
9 during the class period, Ironwood argues that the class representatives’ claims are not
10 typical of claims for any employees in those offices.

12 Although the court is mindful of the concerns Ironwood raises, the court finds
13 these concerns insufficient to make the proposed class representatives’ claims atypical.
14 There is no requirement that a class representative have personal knowledge pertaining to
15 every class member’s claim. Plaintiffs can use evidence from other class members to
16 demonstrate that other Ironwood offices imposed similar wage and hour policies.
17 Typicality merely requires that a class representative’s claim be “reasonably coextensive
18 with those of absent class members.” Hanlon, 150 F.3d at 1020 (noting that
19 representative’s claims “need not be substantially identical”). In this case, although the
20 persons allegedly communicating and enforcing unlawful policies vary from office to
21 office, the policies they communicated were allegedly similar. This is to be expected,
22 because every office appears to have derived its policies from the same source: the
23 instructions of Mr. Duran and Mr. Hatter (or his predecessor) to all Washington offices.
24 While the absence of class representatives from each of Ironwood’s Washington offices
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28 ⁵Mr. Clark and Mr. Kirkpatrick worked temporarily in the Spokane office, but neither of
them alleges that they learned substantial information about wage and hour policies there.

1 raises concerns, the court finds those concerns insufficient to defeat Plaintiffs' showing of
2 typicality.

3 In addition, Ironwood claims that the class representatives are atypical because
4 neither of them worked as hourly-paid office staff or as "remote technicians" ("RTs").
5 The job responsibilities of office staff and FTs are essentially mutually exclusive. In
6 addition, office staff are paid based solely on the hours they work – they do not receive
7 piecework pay. RTs perform the same tasks as FTs, and are paid in essentially the same
8 fashion, but they work in remote areas of Washington, and thus do not have regular
9 physical contact with an Ironwood office. RTs receive less supervision than other FTs.

10 The court finds that despite the differences between RTs, FTs, and hourly paid
11 office staff, the class representatives' claims are typical of each of these classes of
12 employees. Although staff have no claims relating to changes in piece rate schedules or
13 to uniform and tool deductions, their claims for uncompensated time are much the same
14 as the class representatives' claims. The two staff members who submitted declarations
15 claim that they were prevented from taking meal breaks, but ordered to record them
16 nonetheless. Dreke Decl., Parkinson Decl. There is no evidence suggesting that
17 Ironwood did not pay staff for overtime, but to the extent other staff present evidence of
18 unpaid overtime, their claims are likely to be similar in many respects to the
19 representative claims. As to the RTs, they performed the same work under the same pay
20 system for the same managers as other FTs. That their work environment is not identical
21 is insufficient to defeat typicality.

22 As to the four categories of claims in this action, the court finds that the claims of
23 Mr. Kirkpatrick, Mr. Clark, and Mr. Bouchard are typical of all class members. In
24 making this finding, the court does not dismiss the valid concerns that Ironwood has
25 raised regarding differences in the claims of the class members. The court also

emphasizes, as have other courts, that even if the court certifies a class, certification in no way abrogates Plaintiffs' burden to prove all substantive elements of every class member's claim. E.g., Cimino v. Raymark Indus., Inc., 151 F.3d 297, 312 (5th Cir. 1998). Ironwood has ably demonstrated that not every class member has precisely the same claim as the class representatives, and has highlighted the stiff challenges awaiting Plaintiffs. The court finds, however, that the differences among the claims of the class members are insufficient to overcome Plaintiffs' showing of typicality. See Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003) (rejecting contention that typicality required that "each job category had a class representative for each type of discrimination claim"). The court will further discuss the impact of Ironwood's concerns in its discussion of the requirements of Rule 23(b)(3).

4. Plaintiffs Must Do More to Satisfy the Requirements of Rule 23(b)(3).

In order to certify a Rule 23(b)(3) class, the court must find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In making these findings, the court must consider the following non-exclusive list of factors:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation . . . already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). The purpose of the "predominance" and "superiority" requirements for a Rule 23(b)(3) class action is to ensure that class treatment will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about

1 other undesirable results.” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997)
2 (quoting Fed. R. Civ. P. 23 advisory committee’s notes (1966)).

3 **a. Superiority**

4 Turning first to the superiority inquiry, the court has little difficulty concluding
5 that class treatment is the superior means of pursuing redress for the class members. The
6 evidence before the court suggests that each class member’s claim is for relatively little
7 money. Most class members lack either the incentive or the resources to pursue such
8 claims as individual actions. Even though Washington law provides for attorneys’ fees
9 for prevailing parties in wage and hour suits (e.g., RCW § 49.46.090(1)), the court finds it
10 unrealistic to expect that many class members will be able to obtain counsel to represent
11 them on individual claims. It is thus not surprising that although the declarations
12 Plaintiffs submitted indicate that numerous class members complain of improper conduct,
13 there is no evidence that any class member has pursued litigation against Ironwood.⁶
14

15 Given the number of class members, Ironwood’s protestations that class treatment
16 is not the superior means for resolving this dispute seem disingenuous. If Ironwood
17 engaged in no systematic misconduct in Washington, the opportunity to obtain a single
18 judgment binding all Washington employees presents an enormous advantage over
19 hundreds of lawsuits. It is more likely that Ironwood’s preference for individual actions
20 is rooted in the expectation that most class members will not pursue individual actions.
21

22 Given the desirability of resolving these claims in a single action, this court
23 provides a desirable forum for doing so. Three of Ironwood’s four offices are within 200
24

25
26
27 ⁶One former Ironwood employee, Chris Evans, complained to the Washington
28 Department of Labor and Industries regarding Ironwood’s deductions for uniform cleaning and
tool purchase. Exs. 37, 40.

1 miles of Seattle. Although the need to obtain discovery relating to Spokane-based
2 employees may impose some expense, it is not undue expense under these circumstances.

3 **b. Predominance**

4 In determining whether common issues predominate over individual issues, no
5 precise formula guides the court. The court must simply determine whether resolution of
6 common questions would resolve a “significant aspect” of the class member’s claim such
7 that there is “clear justification” for class treatment. Hanlon, 150 F.3d at 1022 (citations
8 omitted). In this case, the court approaches the predominance inquiry by considering
9 whether, assuming Plaintiffs are able to resolve all common issues in their favor, they can
10 reasonably and efficiently resolve the remaining individualized issues within the
11 constraints of a class action.
12

13 As to two of the four categories of claims, individualized issues are minimal. If
14 Ironwood improperly deducted expenses related to uniforms and tools, Ironwood’s own
15 payroll records are sufficient to establish its liability to each class member and each
16 member’s damages. Similarly, if Ironwood has already compensated class members for
17 tool and uniform deductions, Ironwood’s records will reveal as much. If Ironwood
18 improperly changed its piece rates, then class members can resolve individual questions
19 of damage by using Ironwood’s records to compare the amount each class member was
20 paid for a task to the amount he or she should have been paid.
21

22 As to Plaintiffs’ claims for uncompensated hours and improperly recorded meal
23 breaks, individualized questions are more troublesome. Even if Plaintiffs were to prove
24 that Ironwood enforced a requirement that all employees record a meal break even if they
25 did not take one, it does not follow that all recorded meal breaks were improper. The
26 evidence suggests that virtually all employees took meal breaks and properly recorded
27 them on at least some of the days that they worked. Determining each class member’s
28

1 damages, therefore, arguably requires an individualized inquiry into how many meal
2 breaks each class member actually took.

3 Likewise, the claims for uncompensated hours present complicated individualized
4 questions. Even if Ironwood had a policy of reducing overtime hours by unlawful means,
5 the evidence shows that the means were far from uniform. Accepting Plaintiffs'
6 allegations as true, Ironwood altered some employees' time cards, refused to pay some
7 employees for all or part of their drive time, directed other employees not to record more
8 than a fixed number of hours, required some employees to engage in various types of off-
9 the-clock work, and used threats to prevent employees from recording all of their time.
10 Moreover, it seems beyond dispute that virtually all employees had weeks in which they
11 were properly compensated for all hours that they worked, even where they worked
12 seventy or more hours. Even assuming that Ironwood operated its Washington offices
13 under a corporate directive to reduce recorded hours by improper means, it appears that
14 Ironwood did not employ a consistent policy with respect to any single employee, much
15 less a consistent policy across the class. To prevail on their claims for uncompensated
16 work, therefore, the Plaintiffs will need some means of resolving, *inter alia*, the number
17 of hours each class member worked, the number of hours for which each class member
18 was paid, and the type of wrongful conduct Ironwood used to cause the employee to
19 record fewer hours.
20

21
22 Determining whether common questions predominate over the individual issues
23 noted above turns largely on the approach the class representatives take to resolving the
24 individual issues. In other class actions, plaintiffs have used various methods of
25 determining aggregate damages and determining individual class members' recoveries.
26 See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 782-84 (9th Cir. 1996) (describing use
27 of statistical sampling in conjunction with a series of proceedings before a special
28

1 master). A discussion of the variety of mechanisms available to fairly and efficiently
2 address individual issues within a class action exceeds the scope of this order. The court
3 would prefer to discuss how one or more of those mechanisms might promote efficient
4 resolution of the individualized issues in this case, but Plaintiffs have taken virtually no
5 steps down that path.

6 Plaintiffs have done little more than recite nebulous possibilities for addressing
7 individualized issues; they offer no concrete plan for addressing them. When pressed at
8 oral argument for a method of determining damages and other individualized issues for
9 class members, Plaintiffs' counsel could offer nothing specific. When class counsel is
10 unable to articulate a case management plan, the court has ample reason to question
11 whether this class is manageable as a class action.

12 Nonetheless, the court is convinced that there are methods of managing this action
13 to ensure that common issues predominate over individualized ones. That Plaintiffs'
14 counsel have failed to articulate a method is a curious shortcoming, but the court is
15 convinced in light of the considerable advantages of class treatment that this shortcoming
16 need not *necessarily* prevent class certification. The court therefore reserves ruling on the
17 predominance requirement, pending submissions in accordance with the ruling below.

18 **5. Ruling of the Court**

19 For the reasons stated above, the court rules as follows:

- 20 (1) The court grants and denies Plaintiffs' motion for class certification in the
21 following respects:
- 22 (a) Plaintiffs have satisfied the numerosity, commonality, and typicality
23 requirements of Rule 23(a).
 - 24 (b) Mr. Kirkpatrick, Mr. Clark, and Mr. Bouchard may serve as class
25 representatives. Mr. Miller may not.

- 1 (c) With the exception of those class members who performed work in Oregon,
2 the class representatives listed above satisfy the adequacy of representation
3 requirement of Rule 23(a)(4).
4
5 (d) The court reserves ruling on whether Plaintiffs have satisfied the
6 predominance requirement of Rule 23(b)(3), and whether employees who
7 worked in Oregon are properly included in the class.
- 8 (2) The court denies Ironwood's motion to deny class certification.
- 9 (3) The court will certify this action as a class action, provided that Plaintiffs meet the
10 following conditions:
- 11 (a) Plaintiffs must submit a plan for litigating this action. The plan must
12 demonstrate to the court that Plaintiffs can manage this action in a manner
13 in which common issues predominate over individualized issues. The plan
14 must include, at a minimum, (i) a description of the scope of discovery in
15 this action, including the number of depositions Plaintiffs expect to take and
16 an explanation of how the discovery will assist in resolving both common
17 and individualized issues in this action, (ii) a schedule for dispositive
18 motions, including a statement regarding whether Plaintiffs expect to be
19 able to dispose of any common issues on summary judgment, (iii) a plan for
20 determining damages in this action, and (iv) a plan for resolving this case at
21 trial, including a discussion of whether bifurcation is appropriate, and
22 whether individual trials or proceedings will be necessary. The plan shall
23 also include a schedule for completing stages of this litigation.⁷
24
25
26

27 ⁷Although the parties previously stipulated to a schedule for resolving this action within
28 ten months of class certification (Dkt. # 20), the court declined to enter a schedule until it
resolved the class certification issue.

- 1 (b) Counsel for Plaintiffs shall meet and confer with counsel for Ironwood as
2 soon as practical to discuss the issues to be addressed in the above litigation
3 plan. The litigation plan need not be a joint submission from the parties,
4 but it must reflect input from Ironwood. Plaintiffs shall note portions of the
5 plan to which Ironwood has agreed or disagreed. The parties shall also
6 discuss whether it is appropriate to certify subclasses in this action, and
7 whether naming additional class representatives is appropriate.
8
- 9 (c) Plaintiffs shall submit the litigation plan within 30 days of this order.
10 Ironwood shall file no pleading regarding the litigation plan unless the court
11 requests its input.
- 12 (d) Plaintiffs shall submit a proposed plan for providing notice to class
13 members along with their litigation plan. The plan shall include a draft of
14 notification materials that Plaintiffs propose to send to class members.
15
- 16 (e) Within 14 days of this order, Plaintiffs shall submit a supplemental brief of
17 no more than 7 pages demonstrating that seeking relief solely under
18 Washington law provides adequate redress to Washington FTs who worked
19 in Oregon, or proposing additional claims that will provide adequate
20 redress. Within 7 days, Defendants shall respond to Plaintiffs'
21 supplemental brief in a brief of no more than 7 pages. The court will not
22 consider a reply brief.

23 **B. Washington Consumer Protection Act**

24 The court now turns to Ironwood's motion for summary judgment on Plaintiffs'
25 claim under the Washington Consumer Protection Act ("CPA"). In reviewing the motion,
26 the court must draw all inferences from the evidence in the light most favorable to the
27 non-moving party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000).
28

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden to demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets its burden, the opposing party must show that there is a genuine issue of fact for trial. Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must present significant and probative evidence to support its claim or defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). For purely legal questions, summary judgment is appropriate without deference to either party.

The court must decide whether any of Plaintiffs' allegations against Ironwood are actionable under the CPA. The text of the CPA, which declares that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful, provides little assistance in resolving this question. RCW § 19.86.020. In Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 533 (Wash. 1986), the Washington Supreme Court established five elements a private party must prove to prevail on a CPA claim: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation."

Based solely on the Hangman Ridge test, Plaintiffs have presented sufficient evidence to sustain a CPA claim. Plaintiffs have produced evidence from which a jury could conclude that Plaintiffs engaged in an unfair or deceptive acts that occurred in trade or commerce. Ironwood solicited employees from the general public, and at least impliedly represented that they would be paid in conformity with Washington law. A jury could conclude that Ironwood did not pay its employees in conformity with

1 Washington law, and that its actions therefore “had the *capacity* to deceive a substantial
2 portion of the public.” Hangman Ridge, 719 P.2d at 535 (emphasis in original).

3 Although disputes between private parties generally do not impact the public interest, the
4 “likelihood that additional plaintiffs have been or will be injured in exactly the same
5 fashion . . . changes a factual pattern from a private dispute to one that affects the public
6 interest.” Id. at 538. Here, because there is evidence that Ironwood subjected all of its
7 employees to unlawful pay practices, and continues to do so while soliciting employees
8 from the general labor market, Plaintiffs can prove a public interest impact. Finally, there
9 is no dispute that Plaintiffs have evidence that they suffered injuries attributable to
10 Ironwood’s conduct.

12 Ironwood’s argument that the CPA does not apply to employment-related disputes
13 between employers and employees is intriguing, but ultimately insufficient. First, the
14 court notes that there is generally no bar to using the CPA as a supplemental means of
15 pursuing violations of other Washington statutes. E.g., Hangman Ridge, 719 P.2d at 535
16 (listing nine examples of nine statutes for which violations are also “per se” violations of
17 the CPA). The existence of Washington statutes more specifically tailored to Ironwood’s
18 alleged misconduct is therefore not an automatic bar to a CPA claim.

20 The court also concludes that RCW § 19.86.070 provides no support for
21 Ironwood’s position. The statute declares that “the labor of a human being is not a
22 commodity or article of commerce.” RCW § 19.86.070. Ironwood neglects to mention,
23 however, that the statute is in part titled “[c]hapter not to affect mutual, nonprofit
24 organizations” and is targeted at labor unions and similar organizations:

26 Nothing contained in this chapter shall be construed to forbid the existence
27 and operation of labor, agricultural, or horticultural organizations, instituted
28 for the purposes of mutual help, . . . or to forbid or restrain individual
members of such organizations from lawfully carrying out the legitimate
objects thereof.

1 Id. Only three courts have published opinions citing this statute. One construed the
2 statute as “exempt[ing] labor associations from the scope of the [CPA].” Ernst Home
3 Ctr., Inc. v. United Food & Commercial Workers Int’l Union, 77 Wn. App. 33, 46, 888
4 P.2d 1196 (Wash. Ct. App. 1995). Another construed it as an “agricultural exemption.”
5 Golob & Sons, Inc. v. Schaake Packing Co., 609 P.2d 444, 445 (Wash. 1980). The third
6 court mentioned the statute only in passing. Short v. Demopolis, 691 P.2d 163, 168
7 (Wash. 1984). Absent any indication that Washington courts have construed the statute
8 as bearing on the CPA’s application to the employer-employee relationship, the court
9 declines to adopt Ironwood’s novel interpretation.
10

11 Paradoxically, Ironwood seals its own fate with respect to its summary judgment
12 motion by pointing out that the Washington Law Against Discrimination (“WLAD”)
13 exempts employer-employee disputes from coverage under the CPA. The principal anti-
14 discrimination provision of the WLAD makes all violations of the statute per se
15 actionable under the CPA, except “any unfair practice committed by an employer against
16 an employee or a prospective employee.” RCW § 49.60.030(3). That the legislature
17 chose to specifically exempt such WLAD claims from the scope of the CPA suggests that
18 where it has declined to do so, courts should not construct such an exemption. The
19 Hangman Ridge court reached the same conclusion. See 719 P.2d at 536 (“[T]he
20 Legislature, not this court, is the appropriate body to establish th[e] interaction [between
21 the CPA and other statutes] by declaring a statutory violation to be a per se unfair trade
22 practice.”). None of the statutory systems under which Plaintiffs seek relief contains the
23 required expression of legislative intent. Indeed, the Washington Minimum Wage Act,
24 under which several of Plaintiffs’ claims arise, expressly provides that it does not
25 undermine the provisions of any other statute that might provide relief. RCW
26 § 49.46.120.
27
28

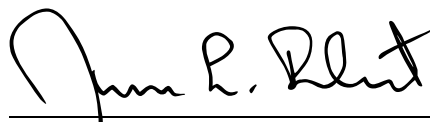
1 Ironwood points to only one other Washington authority that marginally supports
2 its position. In Smith v. K-Mart Corp., the court observed that “no reported Washington
3 cases involv[e] a Consumer Protection Act claim by an employee against [his] employer,”
4 and noted in dicta that “it appears that the [CPA] may not apply to employer-employee
5 disputes.” 899 F. Supp. 503, 507 (E.D. Wash. 1995) (declining to remand state law
6 claims to state court). The court concurs in the observation that it is aware of no instance
7 in which a plaintiff has successfully recovered damages arising out of an employment
8 dispute under the CPA. Although the paucity of authority might reflect the CPA’s
9 inapplicability to such disputes, it might also reflect that given the wide range of statutory
10 remedies that apply specifically to such disputes, no plaintiff-employee has needed to
11 press a claim under the CPA.
12

13 Ultimately, the court finds no authority supporting Ironwood’s efforts to bar
14 Plaintiffs from seeking relief under the CPA. The court therefore denies Ironwood’s
15 motion for summary judgment, but does so without prejudice to moving the court to
16 certify Ironwood’s legal question to the Washington Supreme Court pursuant to RCW
17 § 2.60.020.
18

19 IV. CONCLUSION

20 For the reasons stated above, the court GRANTS in part and DENIES in part
21 Plaintiffs’ motion for class certification (Dkt. # 24); DENIES Ironwood’s motion to deny
22 class certification (Dkt. #38), and DENIES Ironwood’s motion for summary judgment on
23 Plaintiffs’ CPA claim (Dkt. # 21).
24

25 Dated this 16th day of August, 2006.

26
27 

28 JAMES L. ROBART
United States District Judge